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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,
v.
Plaintiffs,

WILBUR L. ROSS, JR., et al.,
Defendants.

CASE NO. 5:20-cv-05799-LHK
**JOINT CASE MANAGEMENT
STATEMENT**

Date: January 11, 2021
Time: 3 p.m.
Place: Courtroom 8
Judge: Hon. Lucy H. Koh

1 Pursuant to Civil Local Rule 16-10(d) and the Court's January 4, 2021 Case Management
 2 Order (Dkt. 427), the parties to this action, by their respective counsel, respectfully submit the
 3 following Joint Case Management Statement in anticipation of the Further Case Management
 4 Conference scheduled for January 11, 2021 at 3 p.m.

5 **I. DOCUMENT PRODUCTIONS**

6 **Plaintiffs' Position**

7 **A. *Plaintiffs' Renewed Motion to Compel and for Sanctions Regarding Summary
 8 Data Reports/Defendants' Ongoing Failure to Produce Data Responsive to
 Plaintiffs' Sufficient-to-Show Requests for Production***

9 In accordance with the briefing schedule set forth in the January 4 Case Management
 10 Order (Dkt. 427), on January 5, 2021, Plaintiffs filed their Renewed Motion to Compel and for
 11 Sanctions regarding Defendants' continual failure to provide summary data reports responsive to
 12 Plaintiffs' sufficient-to-show requests regarding data collection processes, metrics, issues, and
 13 improprieties. *See* Dkt. 433. Plaintiffs' motion is fully briefed and pending before the
 14 Magistrate Judge Panel. Dkt. 440.

15 As of the time of this filing, Defendants have still not identified a single Bates number of
 16 previously produced materials containing the Court-ordered data and have not otherwise cured
 17 their failure to produce the requisite data in accordance with the Court's Order to Compel. Dkt.
 18 372, 380.

19 **B. *Missing Documents***

20 As described in the parties' December 30 and January 4 Joint Status Reports (Dkt. 417,
 21 424), Plaintiffs are *still* waiting for a large but tailored set of critical materials Defendants have
 22 never produced, despite agreement and Court order. Defendants' failures to date already caused
 23 the Court to extend the fact discovery cut-off to January 21, 2021. They continue to stonewall.

24 The parties discussed these ongoing issues with the Court at the January 4, 2021 Case
 25 Management Conference, where the Court underscored Defendants' "ongoing discovery
 26 obligations," particularly as facts pertaining to newly discovered Census anomalies change. Jan.
 27 4, 2021 Hr'g Tr. at 31:3-15. The Court emphasized that Defendants' "discovery obligation is
 28 ongoing as facts on the ground change, that it can't just be the frozen snapshot" based on data

1 collection done earlier in December. *Id.* Defendants averred that they “of course understand[ood]
 2 that [their] discovery obligations are ongoing.” *Id.* at 31:20-21. Despite that clear
 3 representation, Defendants have not produced a single new document to Plaintiffs since
 4 December 31, 2020. As a result, the pressing open items regarding Defendants’ missing
 5 productions that Plaintiffs identified in the January 4 Joint Status Report remain outstanding.
 6 Plaintiffs reiterate these open items below:

7 **1. Failure to produce recent documents, but instead decide to make
 mid/late December *en masse* productions that had arbitrary cutoffs
 in November**

- 8 ○ The vast bulk of materials produced between December 14-21,
 9 as compelled by the Court in its December 13 Order, had
 10 arbitrary cut-offs in November. Defendants have said they are
 11 looking to update their productions, but have provided no date
 12 certain for completion as of yet. While, as described below,
 13 Defendants produced a small number of updated documents in
 14 late December, Plaintiffs have not received fully updated
 15 productions for any custodian. Nor have Plaintiffs received any
 16 documents regarding the latest plans, including processing plans
 17 and new anomalies discovered, discussed at the January 4, 2021
 18 conference.

19 **2. Failure to produce any documents from key custodians (Olson,
 Lamas) contrary to discovery schedule and representations to
 Court**

- 20 ○ In their December 31, 2020 production, Defendants finally
 21 produced some materials from these important custodians, after
 22 Plaintiffs raised the issue with the Court. But once again, the
 23 production is largely ethereal (i.e., only 172 documents from
 24 Tim Olson, the head of NRFU), and nowhere close to complete.
 25 Moreover, initial review of these materials indicates, yet again,
 26 a vast trove of largely irrelevant materials, such as mass
 27 marketing emails and news mailers. *Defendants have not
 produced any additional documents for Olson or Lamas since
 December 31, and Plaintiffs are still awaiting complete
 productions for these custodians.*

28 **3. Failure to produce documents from known sources of key
 materials—i.e., EGG (Data Quality Executive Guidance Group
 networked source repository and email list; OIG shared drive
 repository; enumerator complaint and communications
 emails/repositories**

- 1 ○ Defendants still have produced nothing from these core sources,
 2 particularly from the EGG networked source repository and
 3 email list—a group that Albert Fontenot has previously claimed,
 4 to this Court, was formed precisely to “provide direction and
 5 approvals about quality assessments of changes to the
 6 operational plans and of the 2020 Census data during and after
 7 the data collection process.” Dkt. 323-1 at 5. There is no way
 8 Defendants did not know about the EGG, its email list, and its
 9 networked location—and their deliberate decision to not
 10 produce materials from it is highly troubling.

11 **4. Failure to produce any documents from 10 of the identified
 12 custodians, contrary to agreement**

- 13 ○ In an effort to reach a good-faith compromise on open items,
 14 Plaintiffs told Defendants that these materials could take a
 15 backseat to the far more pressing items referenced above.
 16 Given their intransigence on even the materials above, Plaintiffs
 17 believe that Defendants are planning to never produce anything
 18 from this set.

19 To put Defendants’ ongoing approach into perspective, Defendants have produced ***only***
 20 ***1,241 new documents since December 21***, and nothing at all in all of January:

21 ***December 23, 2020 Production: 50 Documents Total***

Custodian	Number of Documents
Abowd, John Maron	2
Ahmad, Ali	2
Christy, James	1
Cogley, Nathaniel	2
Jones, Christa	2
Kelley, Karen Dunn	1
Risko, Daniel	23
Walsh, Michael	17

22 ***December 26, 2020 Production: 39 Documents Total***

Custodian	Number of Documents
Ahmad, Ali	9
Cogley, Nathaniel	4
Kelley, Karen Dunn	1
Risko, Daniel	8
Ross (WLR) Wilbur L.	1
Sprung, Michael	1
Thieme, Michael	1
Walsh, Michael	13
Mayfield, Earl	1

1 ***December 30, 2020 Production: 84 Documents Total***

Custodian	Number of Documents
“Census Bureau”	84

3 ***December 31, 2020 Production: 1068 Documents Total***

Custodian	Number of Documents
Lamas, Enrique	871
Olson, Tim	172
Census Bureau	25

7 Plaintiffs waited weeks before filing their renewed motion to compel and for sanctions
 8 regarding Defendants’ failure to produce the Court-ordered summary data reports. Plaintiffs did
 9 so because Defendants had apparently finally begun to indicate they would comply, but that was
 10 not so, as Defendants’ arguments in their opposition last week made clear (including the claim
 11 that Defendants apparently did not understand that actual data reports from their databases were
 12 ever going to be at issue in this case). With respect to the remaining discovery deficiencies
 13 outlined above, Plaintiffs now believe Defendants are taking the same road: delay, leading to
 14 prejudice. The Court will recall that last week, Defendants themselves suggested a schedule
 15 where they would work to produce the remaining discovery materials owed and all document
 16 discovery would end by January 7. That was 4 days ago. Defendants have produced nothing in
 17 all of January

18 Accordingly, Plaintiffs have no choice but seek further relief from the Magistrate Judge
 19 Panel. Pursuant to the Court’s January 4, 2021 Case Management Order (Dkt. 427), Plaintiffs
 20 will be reaching out to the Magistrate Judge Panel regarding this briefing and, subject to the
 21 Panel’s preferences, expect to file their motion to compel covering these issues this week.

22 **Defendants’ Position**

24 As detailed in Defendants’ response to Plaintiffs’ “renewed” motion to compel,
 25 Defendants complied fully with the Court’s December 13, 2020, Order to Compel. That dispute
 26 is currently pending before the Magistrate Judge panel, such that Defendants do not see the need
 27 to repeat the substance of their response here. In the meantime, Defendants are continuing to
 28 update their document collections, and expect to make additional productions as soon as

1 practically possible. Defendants expect these productions to contain updated materials
 2 concerning the anomalies that the Census Bureau has encountered in its data processing, as well
 3 as other information concerning data quality for the 2020 census and the schedule for delivering
 4 apportionment results. Defendants continue to be willing to work in good faith with Plaintiffs to
 5 resolve any disputes, and will respond in due course to any additional motions that Plaintiffs
 6 choose to file.

7 **II. PRIVILEGE LOGS AND RELATED DISPUTES**

8 **Plaintiffs' Position**

9 As discussed in the parties' December 22, December 30, and January 4 Joint Status
 10 Reports, (Dkt. 402, 417, 424), it is now clear that Defendants intentionally failed to log (and
 11 indeed apparently never even looked at) a significant number of documents which do not include
 12 a litigation attorney. Those include a number of documents that do not include any attorney at
 13 all, but instead hit on a broad search term, such as "attorney client" or "work product," as well as
 14 a number of documents that include DOC attorneys that do not serve as litigation counsel for this
 15 lawsuit. It is unheard of for parties to carve out documents that simply contain such terms or
 16 non-litigation counsel and *never even look at or log them*, but pretend that they never existed.
 17 As the Court will recall, Plaintiffs were extremely surprised when—out of a potentially
 18 privileged universe of over 25,000 documents, Defendants produced a log of 135 entries alone.
 19 Defendants represented then that their log was just small. Mass, improper carve-outs as
 20 described above appear to be the reason.

21 Additionally, as set forth in the parties' December 22, December 30, and January 4 Joint
 22 Status Reports (Dkt. 402, 417, 424), Plaintiffs have for weeks sought information regarding a
 23 subset of 2,944 documents that declarant Brian DiGiacomo identified on December 12 as "likely
 24 subject to Executive privilege. The parties' ongoing discussions have been frustrating and
 25 characterized by Defendants' ever-changing numbers and information surrounding this universe
 26 of documents. In a January 8, 2021 letter to Plaintiffs, Defendants finally provided answers to
 27 some, but not all, of Plaintiffs' inquiries. Defendants admitted that numbers included in the
 28 earlier DiGiacomo declarations to the Court were simply wrong. At this point, Plaintiffs are not

1 certain whether further back-and-forth on the Executive privilege and carve-out universes of
 2 documents will be productive, in light of the significant other front-burner discovery items and
 3 Defendants' failure to produce. But Defendants' incorrect representations to Plaintiffs and the
 4 Court regarding the Executive privilege document universe further underscore that Defendants
 5 have improperly withheld and failed to log large swaths of documents that are in fact not
 6 privileged.

7 For weeks, Plaintiffs have patiently sought information regarding Defendants' privilege
 8 assertions and thousands of withheld documents. Plaintiffs have given Defendants numerous
 9 opportunities to provide the requested information, and have agreed to several compromises in
 10 an effort to avoid involving the Court.¹ However, after months of delay and obfuscation,
 11 Defendants have not agreed to properly review and log the thousands of documents that they
 12 claim may be privileged (but have not even reviewed themselves). Fact discovery concludes in
 13 this case on January 21, 2021.

14 Accordingly, as to this issue, too, Plaintiffs have no choice but seek further relief from
 15 the Magistrate Judge Panel. Pursuant to the Court's January 4, 2021 Case Management Order
 16 (Dkt. 427), Plaintiffs will be reaching out to the Magistrate Judge Panel regarding motion
 17 briefing on this issue and plan to file their motion for waiver of privilege over all improperly
 18 carved-out documents later today or tomorrow.

19

20 **Defendants' Position**

21 Defendants have worked closely with Plaintiffs' counsel to provide them with the
 22 information they have requested, both with respect to documents involving the Executive office
 23 of the President, and with respect to Defendants' litigation carve-out. Most recently, in a letter
 24

25 ¹ As the Court will recall, Plaintiffs have been ready to file a motion for further relief
 26 regarding these privilege issues for almost two weeks. In a showing of good faith based on
 27 Defendants' repeated representations that they would promptly provide clarifying information
 28 regarding these documents, Plaintiffs successfully asked the Court several times to extend their
 deadline to move for relief. *See* Dkt. 410, Dkt. 419; *see also* Dkt. 422 (Defendants' January 3
 notice and request to extend Plaintiffs' motion deadline beyond January 4, 2021); Dkt. 427 (Case
 Management Order vacating January 4, 2021 deadline and directing parties to coordinate motion
 briefing schedule with Magistrate Judge Panel).

1 dated January 8, 2021, Defendants provided detailed information in response to Plaintiffs' latest
 2 set of questions. While Plaintiffs in their questions indicated that they were seeking to avoid
 3 motion practice through continued conferral between the parties, they have apparently chosen to
 4 bypass that route, even after Defendants provided the requested information. Defendants are
 5 open, and have continually been open, to a negotiated resolution of this dispute; should Plaintiffs
 6 choose to burden the Court with motion practice, Defendants will respond in due course.

7 **III. DEPOSITIONS**

8 **Plaintiffs' Position**

9 Pursuant to the Court's Order to Compel (Dkt. 371, 380), Plaintiffs took the Rule
 10 30(b)(6) depositions of Defendants Department of Commerce and Census Bureau on December
 11 17, 2020. As set forth in the Joint Statements filed on December 18, 2020 and December 22,
 12 2020, Plaintiffs maintain that neither witness was adequately prepared on various aspects of the
 13 noticed topics. In an effort to resolve these inadequacies, on December 27, 2020, Plaintiffs
 14 requested that Defendants answer under oath no later than December 30, 2020 a set of four
 15 tailored questions to address the topics that Defendants' witnesses were unable to answer at their
 16 depositions. Defendants responded on January 4, 2021 with a declaration from Kathleen Styles
 17 on behalf of the Census Bureau only. Plaintiffs responded with a letter on January 7, 2021,
 18 identifying numerous deficiencies that were unaddressed by Ms. Styles declaration, including
 19 that Defendant Department of Commerce failed to respond at all, and requesting that Defendants
 20 provide the requested information by close of business on January 8, 2020. To date, Defendants
 21 have not responded to Plaintiffs' letter.

22 The Department of Commerce Rule 30(b)(6) deposition will take place tomorrow, on
 23 Tuesday, January 12, 2020, and the Rule 30(b)(6) deposition for Defendant Census Bureau is
 24 scheduled to take place on Thursday, January 14, 2020. In light of the case schedule, Plaintiffs
 25 have to move forward with those depositions despite the fact that Defendants have failed to
 26 produce a critical responsive materials, and from key sources. Because of Defendants' deliberate
 27 delay, however, Plaintiffs intend to keep the depositions open, should later produced materials or
 28 discovered information counsel for additional questioning.

1 Plaintiffs expect that, given Defendants' expansive and unjustified position on the
 2 "Deliberative Process Privilege" to date, Defendants may seek to improperly prevent questioning
 3 on key topics or materials. While Plaintiffs hope that any such issues can be worked through by
 4 counsel, Plaintiffs will be reaching out to the Magistrate Judge Panel today for guidance on how
 5 best to reach a Judge on the panel, as appropriate, should a real-time decision be needed.

6 Finally, Plaintiffs will be serving the remainder of their three fact witness deposition
 7 notices this week. However, because Defendants still have failed to produce documents for two
 8 of Plaintiffs' priority custodians—Tim Olson and Enrique Lamas—and because Defendants have
 9 failed to update document productions for any custodians whatsoever, Plaintiffs have been
 10 unable to adequately assess which individuals they would like to depose. Here, too, time is
 11 simply running out, and Defendants' intransigence is forcing Plaintiffs to choose with
 12 incomplete information. As a result, Plaintiffs may need to reach out to the Court seeking
 13 additional relief on this issue in the future.

14 **Defendants' Position**

15 As reflected in Defendants' prior filings, Defendants maintain that Defendants' prior
 16 witnesses were adequately prepared for the depositions. Indeed, the Census Bureau witness
 17 testified for hours—in great detail—about the nature and functions of the Census Bureau's data
 18 systems, and the capability of those systems (or lack thereof) to generate the type of detailed data
 19 that Plaintiffs have requested. Additionally, Defendants have continued to provide Plaintiffs
 20 additional information following those depositions—and have provided a sworn declaration from
 21 a Census Bureau official to answer additional questions. Defendants will continue to work in
 22 good faith with Plaintiffs on this issue and have told Plaintiffs that they are gathering information
 23 to respond to additional inquiries; these efforts belie Plaintiffs' complaints.

24 Plaintiffs' pre-emptive complaints about depositions that have not yet taken place are
 25 even more unfounded. Indeed, Plaintiffs' preemptive promise to "hold open" depositions they
 26 have neither noticed nor taken is bizarre. And their complaint that they do not know who to
 27 depose rings hollow in light of their representation that they clearly know who their "priority
 28 custodians" are. As with the other issues, Defendants will continue to work in good faith with
 Plaintiffs. It should be noted, however, that the topics Plaintiffs have noticed for deposition are

1 extraordinarily broad and burdensome, and have made the preparations for depositions
2 unnecessarily difficult. To the extent Plaintiffs wish to facilitate the expeditious conclusion of
3 discovery they should work in good faith with Defendants to narrow those topics to appropriate
4 and manageable parameters.

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8 | Dated: January 11, 2021

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20 **ATTESTATION**

21 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
22 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
23 in this filing.

24 Dated: January 11, 2021

25 **LATHAM & WATKINS LLP**

26 By: /s/ Sadik Huseny
27 Sadik Huseny